**Oral Argument Scheduled 02/25/2019**
**Nos.: 18-1150 & 18-1164**

# UNITED STATES COURT OF APPEALS
## for the DISTRICT of COLUMBIA CIRCUIT

**TEMPLE UNIVERSITY HOSPITAL, INC.**

**Petitioners/Cross-Respondents**
**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

**and**

**TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS**

**Intervenor for Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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# BRIEF FOR INTERVENOR

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

As required by Circuit Rule 28(a)(1) of this Court, counsel for Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals certifies as follows:

**A. Parties and Amici.**

1. Temple University Hospital, Inc. was the respondent before the NLRB and is the petitioner/cross-respondent before the Court

2. The NLRB is the respondent and cross-petitioner before the Court; the NLRB's General Counsel was a party before the NLRB.

3. The labor organization, Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals was the charging party before the NLRB and is intervening on behalf of the NLRB.

**B. Rulings Under Review:** This case is before the Court on the Hospital's petition for review and the NLRB's cross-application for enforcement of a May 11, 2018 Decision and Order issued by the NLRB, reported at 366 NLRB No. 88.

**C. Related Cases:** This case has not previously been before the Court.

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January 9, 2019

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Intervenor Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals is an unincorporated association and labor organization.

# TABLE OF CONTENTS

## TABLE OF CITATIONS

Cases: Pages:

Intervenor, Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals (PASNAP) submits the following brief in support of the Decision and Order of the National Labor Relations Board (NLRB or Board) on charges filed by PASNAP against Temple University Hospital, Inc. (Hospital) the petitioners in this appeal. The Board found that the Hospital violated Sections 8(a)(1) and (5) on the National Labor Relations (Act), 29 U.S.C. § 158(a)(1) and (5), by refusing to bargain with the union after its professional medical interpreters and transplant financial coordinators voted in an NLRB-conducted election to join an existing unit of PASNAP-represented professional and technical employees. The Board ordered the Hospital to bargain with the union and the Hospital refused.

## STATEMENT OF JURISDICTION, STATEMENT OF ISSUES AND STATEMENT OF THE CASE

The Intervenor adopts the Statement of Jurisdiction, Statement of Issues, and Statement of the Case as stated in the Respondent Board's opening brief.

## SUMMARY OF ARGUMENT

The Court should enforce the Board's Decision and Order as reported at 366 NLRB No. 88.

The Board reasonably found that the Hospital was not a "political subdivision." The Hospital was neither created directly by the Commonwealth of Pennsylvania nor is administered by individuals who are responsible to public officials or to the general electorate. The Hospital's argument that it should be

considered a political subdivision because the Commonwealth appoints one-third of its controlling entity's board is contrary to longstanding precedent of the Board as supported by various Courts of Appeals. The Hospital's additional claim that the Board should have followed the Board's General Counsel finding in an alleged similar case is similarly without merit. The Board has never adopted the General Counsel's view and the allegedly similar case is easily distinguished on its facts.

The Hospital's other claims similarly fail. The Board properly exercised its discretion in assuming jurisdiction over the Hospital. Despite the Hospital's cavils, the Board acted consistent with its well-established precedent in deciding that previous jurisdiction over the unit by the Pennsylvania Labor Relations Board did not bar the Board from assuming jurisdiction. Additionally, the Board properly exercised its discretion in granting comity to a 40-year-old unit over which the Hospital had bargained with the union and its predecessors. Finally, the Board properly rejected the Hospital's argument that PASNAP was barred by judicial estoppel from arguing in favor of Board jurisdiction.

## STANDARD OF REVIEW

The Intervenor adopts the Standard of Review as stated in Respondent Board's opening brief.

## ARGUMENT

### I. THE BOARD REASONABLY FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION

This is a test of certification case. The Hospital admits that it refused to bargain with PASNAP over the newly certified unit. It defends that refusal by raising issues related to the Board's assumption of jurisdiction in the case. As will be seen below, none of the Hospital's arguments have merit.

#### A. The NLRB reasonably found that the Hospital is not a "political subdivision" exempt from the Board's jurisdiction.

Under Section 2(2) of the Act a "State or political subdivision thereof" is excluded from the statutory defining of "employer[s]" within the NLRB's jurisdiction. 29 U.S.C. § 152(2). "Political subdivision" is not defined in the Act and the Supreme Court has held that the Board's construction of the term is "entitled to great respect." *NLRB v. Natural Gas Util. Dist. of Hawkins Cty*. 402 U.S. 600, 605 (1971); *Yukon-Kuskokwin Health Corp. v. NLRB*, 234 F.3d 714, 717 (D.C. Cir. 2000) (deferring to the Board's interpretation that an Indian tribe does not qualify as a "political subdivision" when it conducts activities off its reservation). The Supreme Court has upheld the Board's construction of "political subdivision" to mean an entity "1) created directly by the state, so as to constitute [a] department [] or administrative arm[] of the government, or 2) administered by individuals who are responsible to public officials or to the general electorate."

*Hawkins Cty.*, 402 U.S. at 604-5. If the entity meets either prong, the Board finds that it is not a statutory employer.

Admitting that it was not created directly by the Commonwealth, the Hospital argues that it qualifies under the second *Hawkins Cty.* prong. When examining the second prong, the Board has explained that "the pertinent question is 'whether a majority of the individuals who administer the entity … are appointed by and subject to removal by public officials." *Midwest Div. MMC, LLC v. NLRB*, 867 F.3d 1288, 1297 (D.C. Cir. 2017), *quoting Pilsen Wellness Ctr.*, 359 NLRB 626, 628 (2013). To answer this pivotal question, the NLRB examines whether the composition, selection and removal of the members of an entity's governing board are determined by law or by the entity's governing documents. *Hyde Leadership Charter Sch.*, 364 NLRB No. 88, 2016 NLRB Lexis 623, *25 (August 24, 2016). If those documents indicate that appointment and removal are controlled by private individuals—as opposed to public officials—the entity is subject to the Board's jurisdiction. *Id. accord FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002) ("An entity can only satisfy the second prong of Hawkins County by ensuring that a majority of its board of directors are directly responsible to the general electorate."); *Jefferson Cty. Cmty. Ctr. for Developmental Disabilities v. NLRB*, 732 F.2d 122, 126 (10th Cir. 1984) (entity not a "political subdivision" although "seven directors are appointed by public agencies" because "a majority of the

Board is neither appointed by nor subject to removal by public officials or the general electorate and has no official connection to any governmental body."); *Truman Med. Ctr. Inc. v NLRB*, 641 F.2d 570, 572-73 (8th Cir. 1981) (hospital not exempt from jurisdiction because the majority of its board of directors was neither appointed nor subject to removal by public officials or the general public.)

The Hospital, however, attempts an end run around *Hawkins Cty*. First, it argues that Temple University should be recognized as a "political subdivision" of the Commonwealth of Pennsylvania because public officials appoint a quorum (one third) of the University's board members and the University has the power to designate or remove Temple University Health System's board, which, in turn, has the power to appoint of remove the Hospital's board. (Pet'r's Brief at 44.) But, the second prong of *Hawkins Cty.*, turns on control over the majority of board members not a (one-third) minority. As recognized by the Fifth Circuit, "if a majority of the board of directors is **not** subject to selection or removal by public officials or the general electorate, the entity **for that reason** fails the second alternative test for being a [] political subdivision." *Voices for Int'l Bus. & Educ., Inc v. NLRB*, 905 F.3d 770, 776 (5th Cir. 2018), *quoting StarTran, Inc. v. OSHRC*, 608 F.3d 312, 323 (5th Cir. 2010). As the Hospital has tacitly admitted, public officials do not appoint a majority of the directors at Temple University and

therefore lack effective control over it. Control over sufficient numbers of board members to constitute a quorum is, therefore, simply irrelevant.

Secondly, the Hospital requests the Court to ignore the Board's decision and to follow the NLRB General Council Advice Memorandum, *Northern Diagnostic Services, Inc.*, GC Advice Memorandum, Case No. 18-CA-60338, 2011 WL 6960025 (December 13, 2011) (finding that a private subsidiary of a 100-percent state-owned and created medical center is exempt from Board jurisdiction as a political subdivision). But, despite the Hospital's repeated misleading reference to *Northern Diagnostic Services* as a "Board" decision (*see*, Pet'r's Br. at 42, 42 n.4, 52), the NLRB Office of the General Counsel issued the memorandum; *Northern Diagnostic Services* is not a decision of the Board. This Court has held that an NLRB advice memorandum that conflicts with a Board decision is not worthy of judicial note. *Chelsea Industries, Inc. v NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (rejecting "out of hand" an employer's suggestion that a Board decision was unreasonable because it conflicted (as here) with an advice memorandum in a similar case.) Moreover, in *Northern Diagnostic Services*, the controlling entity was directly established, owned and controlled by the City of Virginia, Minnesota. Here, there is no dispute that Temple University was chartered by the Commonwealth of Pennsylvania in 1888 as a private college and remains a private entity to this day.

As was pointed out before the Board, the relationship between Temple University and Temple Hospital is nearly identical to that between the University of Pittsburgh and its hospital. Significantly, The Pennsylvania Commonwealth Court found that Pittsburgh University was not a political subdivision as defined in the Act. *International Union, United Plant Guard Workers v PLRB*, 463 A.2d 496 (Pa. Commw. 1982), *affirmed*, 475 A.2d 739 (Pa. 1983). In that case, the Court relied on the fact that the Temple University—Commonwealth Act "set up the same structure for Temple University as the University of Pittsburgh—Commonwealth Act set up for the University of Pittsburgh." *Id.* at 498. It further relied upon and cited *Mooney v. Temple University Bd. of Trustees*, 285 A.2d 909, (Pa. Commw. 1972), *affirmed*, 292 A.2d 395 (1972), finding that Temple University was not a state agency. *Id.*

Finally, as PASNAP pointed out at the hearing on its 2015 representation petition, both the Office of Labor Management Standards of United States Department of Labor and Occupational Safety and Health Administration have determined that the Hospital is subject to federal jurisdiction. (J.A. 77-78, 1757-58.) As noted by the Seventh Circuit, the statutory language for exemptions under the Occupational Safety and Health Act is identical to that of the NLRA. *See Voices*, 905 F.3d at776 n.7

Consequently, the Court should defer to the Board's decision that the Hospital does not qualify as a political subdivision under the Act.

### B. The Board reasonably exercised its discretion in asserting jurisdiction over the Hospital.

The NLRB has broad discretion to exercise its jurisdiction as defined in the statute. "A reviewing court will not disturb the Board's discretionary decision to assert its jurisdiction 'absent a showing that [the Board] acted unfairly and caused substantial prejudice to the affected employer.'" *Human Dev. Ass'n v. NLRB*, 927 F.2d 657, 661 (D.C. Cir. 1991) *quoting NLRB v. Parents & Friends of the Specialized Living Ctr.*, 879 F.2d 1442, 1448 (7th Cir. 1989).

The Hospital complains that the Board acted arbitrarily in refusing to decline jurisdiction over it. The Hospital maintains that the Board should have declined jurisdiction in light of Temple University's 'unique relationship' with the Commonwealth of Pennsylvania. But, for over two decades, the Board has held that in deciding whether it will assert jurisdiction over an employer with close ties to an exempt governmental entity, "the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." *Management Training, Corp.*, 317 NLRB 1355, 1358 (1995) It will not consider the relative degree of control exercised by the employer and the government. *Id.*

As the Board states in its brief, *Management Training* has been approved by every court that has considered it. (*See*, Resp't's Br. at 28.)

Here, the Employer asserts that it is so intertwined with the Commonwealth that the Board should decline to exercise jurisdiction over it. (Pet'r's Br. at 52.) In light of *Management Training*, this argument must fail. Rather, the only relevant questions are whether the employer falls within Section 2(2) of the Act's definition and whether it satisfies the applicable monetary jurisdictional standards. *Management Training*, *supra* at 1358. As explained above, the Hospital falls within the ambit of Section 2(2), and it conceded that it satisfies the Board's monetary standards for an acute care hospital. Therefore, the Board cannot decline jurisdiction on this basis.

### C. The Board reasonably exercised its discretion in granting comity to the 40-year-old Pennsylvania Labor Relations Board certification.

Respondent replies at length to the Hospital's complaint that the Board should not have granted comity to the unit certified by the PLRB in 2006. *In re Employes of Temple Univ. Health Sys.*, PERA-R-050-498-E, 39 PPER ¶ 49, 2006 PA PED LEXIS 69. The Intervenor will not try the Court's patience by repeating those arguments here.

One additional point. In *Screen Print Corporation*, 151 NLRB 1266, 1270 (1965), the NLRB held that an employer ratifies the results of a state election and certification by recognizing its validity and embarking on negotiations, and cannot

thereafter claim that it is not bound by the state certification. *See id.* Here, the Hospital actively took the position that the Pennsylvania Labor Relations Board (PLRB), and not the Board, had jurisdiction over the representation proceeding before the. Once the PLRB conducted its election and certified the Union, the Hospital immediately accepted the certification of the designated unit and commenced bargaining with the Union; subsequently, it has entered into three successive collective bargaining agreements explicitly recognizing the Union as the exclusive representative of unit employees. Having long-accepted the Commonwealth's certification and the Union's status as the exclusive representative of unit employees, the Hospital cannot now claim that the unit is inappropriate.

### D. The Board properly rejected the Hospital's claim that judicial estoppel blocked the union from requesting that it assume jurisdiction.

The Employer asserts that the Board erred by not finding the Union "judicially estopped" from filing the present petition with the Board. Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. *New Hampshire v. Maine*, 532 U.S. 742, 950 (2001); *accord Abtew v. U.S. Dep't of Homeland Security*, 808 F.3d 895, 899-900 (D.C. Cir. 2015). As the Third Circuit Court of Appeals has explained:

> [J]udicial estoppel is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when…there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by adversaries unless such tactics are necessary to secure substantial equity.

*Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3rd Cir. 1996) (internal quotations omitted). "[J]udicial estoppel is an equitable doctrine to be invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. at 950.

"[T]here is an exception to the general concept of judicial estoppel when it comes to jurisdictional facts or positions," such that the doctrine of judicial estoppel "does not prevent a party from making inconsistent legal assertions on the issue of the court's subject-matter jurisdiction." *Whiting v. Krassner*, 391 F.3d 540, 544 (3rd Cir. 2004); Moore's Federal Practice—Civil § 134.30. And "the position sought to be estopped must be one of fact rather than law or legal theory." *E.g.*, *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996).

The Board will not judicially estop a party from invoking rights under the Act when the Board did not participate in the prior proceeding in which the party had allegedly taken a contrary position. *Field Bridge Associates*, 306 NLRB 322, 323 (1992), *enforced sub nom., Service Employees Local 32 B-32J v. NLRB*, 982 F.2d 845 (2d Cir. 1993), *cert. denied*, 509 U.S. 904 (1993); *Galaxy Towers Condominium Ass'n*, 361 NLRB No. 36, 2014 NLRB Lexis 674. *1 fn. 3 (August,

29, 2014). The Board has explained that "as a public agency asserting public rights[, it] should not be collaterally estopped by the resolution of private claims asserted by private parties." *Ibid.* Congress has given the Board the responsibility to enforce rights under the Act. The actions of private parties in proceedings in which the Board did not participate cannot prevent the Board from fulfilling that responsibility.

The Hospital claims that the Union's letter to the PLRB in 2006 expressing confidence that the Board would decline jurisdiction over the Employer if asked bars it from petitioning to represent the Employer's employees, and should nullify the employees eleven-to-one vote designating the Union as their representative. In essence, the Hospital is demanding that "public rights" enshrined in the Act be determined by the Union's legal prediction of the outcome of a proceeding in which the Board did not participate. *Field Associates*, *supra*.

As the Board correctly determined, the Board will not bar a party such as the Union from invoking rights under the Act based on a position the Union took in a proceeding in which the Board was not a party. Second, judicial estoppel "does not prevent [the Union] from making inconsistent legal assertions on the issue of [the Board's] subject-matter jurisdiction." That the Union, over a decade ago, predicted to the PLRB that the Board would decline jurisdiction therefore does not prevent it

from now arguing to the Board that the Board has jurisdiction. Moore's Federal Practice—Civil §134.30.

The Board has also explained that judicial estoppel is inappropriate where "[i]t is not at all certain, or even probable that th[e] Court [in the prior proceeding] would have ruled differently" had the party not taken the position it took. *Lincoln Ctr. for the Performing Arts, Inc.*, 340 NLRB 1100, 1127 (2003). In other words, if it is "not clear from the court decision" in the prior proceeding that the court relied on the party's position, then the party will not be estopped from taking a contrary position in the present proceeding. *Ibid.* Here, there is no evidence that the PLRB relied on any position of the Union in determining that it had jurisdiction over the Hospital. The Hospital itself made identical arguments to the Union's regarding the PLRB's jurisdiction, so that the arguments would have been before the PLRB even if the Union had remained silent. And the PLRB's decision that it had jurisdiction does not indicate any reliance on the Union's view.

Finally, a party cannot be judicially estopped from asserting an inconsistent legal position; rather, judicial estoppel is limited to factual assertions. *E.g.*, *Lowery*, *supra*. Here, the Union's position regarding whether the Board has and should assert jurisdiction is legal, not factual, and therefore judicial estoppel is inapplicable. *Id.*

Consequently, the Board properly found judicial estoppel inappropriate given the facts in this case.

## CONCLUSION

The Board's Decision and Order was factually supported by substantial evidence and legally within its discretion and the Intervenor respectfully requests the Court to enforce the Board's order in its entirety.

Respectfully submitted,

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Dated: January 9, 2019

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,074 words, excluding the parts exempted under the rule. The brief conforms to the typeface required of Fed. R. App. P.32(a)(6) because it is written in proportionally spaced type using Microsoft Word 2010 Times New Roman 14-point type.

January 9, 2019

/s/ Claiborne S. Newlin
Claiborne S. Newlin, Esq.

**CERTIFICATE OF SERVICE**

I certify that on January 9, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the appellate CM/ECF system. I further certify that copies of the foregoing were also served on the parties and their counsel of record through the CM/ECF system.

/s/ Claiborne S. Newlin

January 9, 2019 Claiborne S. Newlin, Esq.

# STATUTORY ADDENDUM

## The National Labor Relations Act, 29 U.S.C. § 151 et seq.

## THE NATIONAL LABOR RELATIONS ACT

**Section 2 of the Act (29 U.S.C. § 152 provides in relevant part:**

When used in this Act

**….**

**(2)** The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

**(a)** Unfair labor practices by employer. It shall be an unfair labor practice for an employer

**(1)** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

….

**(5)** to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)